

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2007 FEB 26 PM 3:11

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

February 26, 2007

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **SOUTHWEST FESTIVALS, INC.**
TCEQ DOCKET NO. 2006-2027-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mary Alice C. McKaughan".

Mary Alice C. McKaughan
Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2006-2027-MWD

2007 FEB 26 PM 3:11

**APPLICATION BY SOUTHWEST
FESTIVALS, INC. AND RICHARD
KORSH FOR A NEW WATER
QUALITY PERMIT NO.
WQ0014665001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING**

The Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality ("the Commission" or "TCEQ") hereby files its response to Ms. Amy Hollingsworth's request for a contested case hearing on Southwest Festivals, Inc.'s and Richard Korsh's ("Southwest Festivals") application to the TCEQ for a new permit. OPIC recommends that the Commission grant Ms. Hollingsworth's hearing request. In support of its recommendation OPIC respectfully submits the following:

I. INTRODUCTION

On November 18, 2005, Southwest Festivals applied to the TCEQ for a new permit to construct a waste water treatment plant and dispose of treated domestic wastewater. The treated domestic wastewater will be disposed of at a daily average flow not to exceed 17,700 gallons per day via surface irrigation of two acres of non-public access land. The proposed wastewater treatment plant will serve the Scarborough Faire Renaissance Festival grounds during its seasonal operation which is seven (7) consecutive weekends in April and May and four (4) consecutive weekends in October as well as single day events through out the year.

Applicant's proposed wastewater treatment facilities and disposal site are located on

Farm-to-Market Road 66, approximately 1.6 miles southwest of Interstate Highway 35 East in Ellis County, Texas. The facility will be a pond system consisting of storage tanks, a facultative lagoon and a storage pond. The proposed irrigation fields are located in the drainage basin of South Prong Creek in Segment No. 0816 of the Trinity River Basin. The draft permit limits effluent application rates to the irrigated land to 2.4 acre feet per year per acre irrigated. The draft permit also requires Applicant to maintain bermuda grass and a native grass mix on the disposal site.

The Application was declared administratively complete on January 3, 2006. Applicant's Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on January 11, 2006 in the *Waxahachie Daily Light*. Applicant's Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on July 9, 2006 in the *Waxahachie Daily Light*. August 8, 2006, was the closing date for the public comment period. The Chief Clerk mailed the TCEQ Executive Director's Response To Comments and Decision on October 25, 2006.

One timely hearing request was received on this Application from Ms. Amy Hollingsworth on February 17, 2006. In her hearing request, Ms. Hollingsworth claims that the facility is being constructed across the street from her neighborhood. Ms. Hollingsworth objects to the TCEQ granting this permit because she is concerned that effluent from the Facility will cause an unpleasant odor, contribute to flooding and contaminate the creek that runs behind her home.

II. APPLICABLE LAW

To obtain a hearing, Ms. Hollingsworth's hearing request must identify her personal justiciable interest affected by the Application; demonstrate why she is an "affected person" who

may be adversely affected by the Application in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of her hearing request; and provide any other information specified in the public notice of application.¹ Under 30 TAC §55.203(a), an affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” This justiciable interest does not include an interest common to the general public. 30 TAC §55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person’s timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission’s decision on the application. 30 TAC 55.211(c).² Accordingly, pursuant to 30 TAC §55.209(e), responses to hearing requests must specifically address:

¹ 30 TAC §55.201(d).

² A hearing request can not be based on an issue raised solely in comments that have been withdrawn by written letter filed with the chief clerk prior to the filing of the executive director’s response to comments. 30 TAC §55.211(c)(2)(A).

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

III. DISCUSSION

A. Affected Person Status

Ms. Hollingsworth is concerned that odor from the irrigation fields will interfere with her use and enjoyment of her property. Odor from the irrigation fields could potentially impact Ms. Hollingsworth's use and enjoyment of her property because of the fields' proximity to Ms. Hollingsworth's residence. Ms. Hollingsworth is not listed as an adjacent land owner in Southwest Festival's Application. However, from the map submitted with the Application and the gps map submitted by the TCEQ Executive Director, it appears that the irrigation fields are approximately a half mile from Ms. Hollingsworth's home. Because of this proximity, there is a reasonable relationship between Ms. Hollingsworth's concern about odor and the activity regulated.

Ms. Hollingsworth is also concerned that runoff from the Facility's irrigation fields will contaminate the creek running behind her home. Runoff from the irrigation fields may adversely impact the creek behind Ms. Hollingsworth's home if that creek is South Prong Creek. South Prong Creek may be impacted because the irrigation fields are located in the drainage basin of

South Prong Creek.³ A drainage basin is the topographic region from which a stream receives runoff. However, Ms. Hollingsworth does not identify in her request which creek runs behind her home.

Ms. Hollingsworth also raises the concern that the Facility discharge may contribute to flooding in the area. The TCEQ does not have jurisdiction to regulate wastewater discharge applicants based on flooding concerns which have not been clearly tied to concerns about the condition of the receiving discharge route, erosion, turbidity, or water quality. Therefore, the flooding issue raised by Ms. Hollingsworth does not directly relate to whether the Applicant will meet the requirements of applicable substantive law,⁴ and is not relevant and material to the Commission's decision on the Application.⁵

Pursuant to the above, odor from the irrigation fields may detrimentally impact Ms. Hollingsworth's use and enjoyment of her property,⁶ thereby creating a reasonable relationship between the concerns expressed in Ms. Hollingsworth's hearing request and the proposed effluent disposal location.⁷ Ms. Hollingsworth's concerns regarding the odor from the fields and the possible contamination of the creek behind her home are also protected by the law under which

³TCEQ Technical Summary and Executive Director's Preliminary Decision, Page 1.

⁴ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

⁵ 30 TAC § 55.211(b)(3)(A) (2006).

⁶ 30 TAC § 55.203(c)(4) & (5)

⁷ 30 TAC § 55.203(c)(3)

the application will be considered.⁸ The TCEQ rules require that the quality of the water in the state be maintained consistent with public health and enjoyment.⁹ Therefore, OPIC respectfully recommends that the Commission grant this hearing request because Ms. Hollingsworth has established herself as an "affected person" who has standing to request a contested case hearing on this Application.

B. Issues Raised in the Hearing Requests

Ms. Hollingsworth's request raises the following issues concerning the proposed plant and its operations:

1. Whether there is adequate control of odor from the disposal area;
2. Whether the disposal activities will result in contamination of the creek behind Ms. Hollingsworth's home; and,
3. Whether Facility discharge will contribute to flooding.

1. Issues Disputed

Each of the issues raised by Ms. Hollingsworth are disputed. The issues were raised during the comment period and addressed by the executive director in the response to comments.

2. Issues of Fact

Ms. Hollingsworth's issues concern the suitability of the proposed disposal site and whether the proposed plant's operations will be adequately protective of the State's water resources. These are issues of fact appropriate for referral to the State Office of Administrative Hearings.

⁸30 TAC §55.203(c)(1)

⁹30 TAC §309.1, §309.4 & §309.20

3. Issues Raised During the Comment Period

Ms. Hollingsworth raised all of the issues discussed above in her hearing request which was filed during the comment period.

4. Relevant and Material Issues

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). Issues concerning the suitability of the disposal site and the adequacy of the permit to assure protection of the State's water resources are addressed by the requirements of 30 TAC §309 Subchapter C, Land Disposal of Sewage Effluent, §309.20. Requirements to abate and control nuisance odor prior to construction of a new wastewater treatment plant unit are addressed in 30 TAC §309.13(e).

Therefore, the issues raised by Ms. Hollingsworth regarding odor and possible contamination of the creek behind her home are relevant and material to the Commission's decision of the pending application because they are addressed by the substantive law governing the application, are within the jurisdiction of the TCEQ, and can be addressed in a hearing on the pending application. As discussed above, the TCEQ generally does not have jurisdiction to regulate wastewater discharge applicants based on flooding concerns. Therefore, the flooding issue raised by Ms. Hollingsworth are not relevant and material to the Commission's decision on the Application.¹⁰

5. Issues Recommended for Referral to Hearing

In light of the requirements of 30 TAC §§ 50.115(b) and 55.211(b)(3)(A)(I), OPIC recommends that the Commission refer the following disputed issues of fact to SOAH:

1. Whether there is adequate control of odor from the disposal area.

¹⁰ 30 TAC § 55.211(b)(3)(A) (2006).

If Ms. Hollingsworth files a timely reply identifying the creek behind her house as the South Prong Creek OPIC may recommend that an issue be referred to the State Office of Administrative Hearings ("SOAH") regarding whether the irrigation of the fields would adversely impact the stream behind her home.

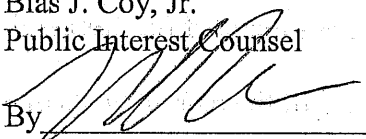
C. Maximum Expected Duration of Hearing

Commission rule 30 TAC § 50.115(d) requires that any commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six (6) months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

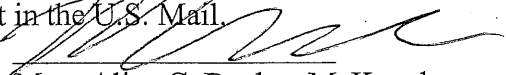
OPIC recommends granting Ms. Hollingworth's request for a contested case hearing on the above-referenced issue for a duration of six months.

Respectfully submitted,
Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2007, the original and eleven true and correct copies of the Office of the Public Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via facsimile transmission, and Inter-Agency Mail or by deposit in the U.S. Mail.


Mary Alice C. Boehm-McKaughan

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TCEQ DOCKET NO. 2006-2027-MWD

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